Remarks

In connection with the amendments, Applicant supplies the following remarks:

1. Claims 6-10 were objected to under 37 CFR 1.75 and being a substantial duplicate.

By the above response, Applicant has amended claims 1-5 and cancelled claims 6-10 to comply with 35 U.S.C. § 101.

2. Claims 1-10 were rejected under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point our and distinctly claim the subject matter with applicant regards as the invention.

Applicant has amended the claims to recite the steps involved in the method/process. The phrase "other nutritional supplements" has been deleted. Physical exam and lab results are added to the results of the health questionnaire prior to generating the dietary supplement profile. Providing a list of commercially available products is a final step in the method/process. In claim 5, the method/process of creating a plan for weight management is an optional step that is not part of the dietary supplement profile, but the dietary supplement profile can be used to generate a weight management plan.

3. Claims 1-10 were rejected under 35 U.S.C. § 102(e) as being anticipated by Summerell et al (U.S. Pat. No. 5,937,387.

Claims 1-10 were rejected under § 102(e) as being anticipated by Summerell. Summerell teaches a system and method for determining a users physiological age by providing a wellness plan based on risk factors to calculate survival rate. Summerell uses the information from the health profile questionnaire "to determine the user's relative risk stratification level" (Col. 9, line 35-37). In Figure 5, the questionnaire asks "Do you usually wear a seat belt?" Such questions have no

significance in determining a dietary supplement profile, but in determining risk and calculating survival rate.

Summerell does not teach or suggest changes in an individual's dietary supplements to overcome risk factors. In Figures 19, 20, 22, 24 and 25 the amount of vitamin C, vitamin E and folate is unchanged, as in a one-size fits all vitamin tablet, and makes no reference to other vitamins, minerals, amino acids, enzymes or herbs.

Summerell teaches the recognition of high blood pressure as a risk factor, but offers no dietary supplement profile to counteract the risk. Summerrell recommends the use of exercise, stress reduction, salt restriction, weight loss, decrease alcohol consumption and anti-hypertensive medication (Fig. 24). No individual dietary supplement plan is taught or suggested in the recommendation. His wellness plan considers total and HDL cholesterol, but only recommends reducing dietary cholesterol, exercise and an alcoholic drink at night (Fig. 18, 20, 22, 23). The weight loss recommendation in Fig 24 offers no individual plan but suggests a 10% reduction in weight. If such a recommendation had any chance of success there would be no rampant obesity and no weight loss centers in this country.

In the Applicant's invention, the amount of dietary supplements are adjusted to reflect changes in an individual's needs. See page 3, lines 22 to page 4, line 11. Summerell offers no dietary supplement profile listing the vitamins, minerals, amino acids, enzymes and herbs suggested for an optimal health profile.

The Courts have held that "anticipation" requires that each and every limitation be disclosed in the reference relied on. *Rohm and Haas Co. v. Mobil Oil Corp.*, 718 F.Supp 274, 299 (D.Del. 1989). In *Agrichem v. Loveland Industries*, 843 F.Supp 520, 529 (D.Minn. 1994) the Court held

that:

> Whether a prior art reference anticipates a patented claim is a question of fact. *Scripps Clinic & Research Fdn. V. Genentech, Inc.*, 927 F.2d 1565, 1576 (Fed.Cir.1991). Anticipation is established under section 102 only when a single prior art reference discloses each and every element and limitation of the claims at issue. *Carella v. Starlight Archery and Pro Line Co.* 804 F.2d 135, 138 (Fed.Cir.1986); *RCA Corp. v. Applied Digital Data Sys. Inc.*, 730 F.2d 1440, 1444 (Fed.Cir.1984). Every element of the invention must be literally present, arranged as in the claims. *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 894 (Fed.Cir.1984). If the prior art reference does not disclose all elements of the claim, it does not anticipate the invention.

Applicant's invention uses information created by a health questionnaire and the addition of information provided by a physical exam and laboratory studies to generate a computer-implemented dietary supplement profile and a list of commercially available products to obtain an optimal health profile. Summerrel offers no such dietary supplement profile of vitamins, minerals, amino acids, enzymes and herbs, but makes general recommendations to reduce risk factors to calculate a survival rate.

The Applicant's claims differ from Summerell and thus are not anticipated. Applicant therefore submits that anticipation by Summerell is not legally justified and is therefore improper. Applicant submits that the rejection on these references is also improper and should be withdrawn.

Conclusion

For all of the above reasons, Applicant submits that the Response to the Office Action is consistent with the requirements of 35 U.S.C. § 112, 2nd paragraph, and § 102(e). Applicant has amended the claims of this application so that they are proper, definite, and define novelty which is also unobvious. If for any reason this application is not believed to be in full condition for allowance,

applicant respectfully requests the constructive assistance and suggestions of the Examiner pursuant to M.P.E.P. § 706.03(d) and § 707.07(j) in order that the undersigned can place this application in allowable condition as soon as possible and without the need for further proceedings.

Respectfully submitted,

Edward J. Petrus
3413 Spanish Oak Dr.
Austin, Texas 78731
Tel: (512)-454-6500
Fax: (512)-453-0066
Applicant Pro Se
June 11, 2002